IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH

INCOME TAX APPEAL NO. 83 OF 2004

Commissioner of Income-tax – I,
Ayakar Bhawan, Telangkhedi Road,
Civil Lines, Nagpur. ... APPELLANT

Versus

M/s. Dinshaw Frozen Foods,
Nagpur. ... RESPONDENT

Shri Anand Parchure, Advocate for the appellant.
Shri Kishor Dewani, Advocate for the respondent.

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CORAM : D.D. SINHA AND
B.P. DHARMADHIKARI, JJ.
DATE OF RESERVING THE ORDER : OCTOBER 24, 2007.
DATE OF PRONOUNCING THE ORDER : DECEMBER 07, 2007.

ORDER : (PER B.P. DHARMADHIKARI, J.)

This Income-tax Appeal under Section 260-A of the Income-tax Act, 1961, is listed today for admission.

2. Heard Shri Parchure, learned counsel for the appellant and Shri Dewani, learned counsel for the respondent. Though in Appeal memo in

para 3, four questions have been framed as substantial questions of law, the appellant has restricted its arguments only to question No. IV, which reads as under :

> "(iv) Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in reversing the order of CIT (Appeal) directing to allow deduction in respect of expenditure incurred on purchase of glow sign boards and trolleys at Rs.83,04,550/- and Rs.1,75,200/-, respectively holding the same as revenue expenditure ?"

For the Assessment Year 1998-99, the Additional Commissioner of Income-tax, Special Range-I, Nagpur, has finalised assessment by treating expenditure of Rs.83,04,550/- on glow sign boards and expenditure of Rs.1,75,000/- on trolleys as capital expenditure. The said order was questioned before the Commissioner of Income-tax (Appeal), Nagpur, and said authority has partly allowed the appeal but maintained the impugned treatment. The assessee filed further appeal before Income-tax Appellate Tribunal, Nagpur Bench and so far as these items are concerned, assessee contended that the expenditure ought to have been treated as revenue expenditure and not as capital expenditure. After examining the claim on merits, Income-tax Appellate Tribunal has

accepted this stand of assessee – respondent. However, in para 12.2 of its order the Income-tax Appellate Tribunal has stated that for the earlier assessment year i.e. 1997-98 and subsequent two assessment years i.e. 1999-2000 and 2000-01, said expenses have been accepted as revenue expenditure by the department. Hence, by impugned order dated 16.2.2004, the Income-tax Appellate Tribunal directed the Assessing Officer to allow the above expenses as revenue expenditure.

3. Shri Parchure, learned counsel has placed reliance upon the judgments in the case of Delhi Cloth & General Mills Co. Ltd. vs. Additional Commissioner of Income-tax, reported at (1986) 160 ITR 857 (Delhi High Court), Commissioner of Income-tax, Andhra Pradesh vs. Taj Mahal Hotel, reported at (1971) 82 ITR 44 (SC), Madras Industrial Investment Corporation Ltd. vs. Commissioner of Income-tax, reported at (1997) 225 ITR 802 (SC) and Commissioner of Income-tax, Delhi-I vs. National Air Products Ltd., reported at (1980) 126 ITR 196 (Delhi High Court), to substantiate his argument that the glow sign boards and trolleys constitute plant within the meaning of Section 43 of the Income-tax Act, 1961, and hence the expenditure on it could not have been

allowed as revenue expenditure. It is further contended by him that for Assessment Years 1997-98, 1999-2000 and 2000-01, the expenditure has been treated as capital expenditure in the year in which it was initially incurred on glow sign boards and trolleys and has been thereafter treated as revenue expenditure in subsequent years. He contends that amount spent on maintenance of glow sign boards and trolleys has been treated as revenue expenditure. He contends that assessee himself has shown the entire expenditure as deferred revenue expenditure spread over for a period of four years. According to him, in these circumstances, the substantial question of law as framed in the appeal arises for consideration of this Court.

4. As against this, Shri Dewani, learned counsel for the respondent, has stated that the treatment by present assessee – respondent to the expenditure as revenue expenditure has been accepted by department in 1997-98 and thereafter in 1999-2000 and 2000-01. He contends that there is nothing on record to show that the said treatment has been agreed to or accepted by department only in relation to maintenance cost of glow sign boards or trolleys. He invites

attention to discussion by Income-tax Appellate Tribunal in this connection at the end of para 12 and argues that findings recorded therein are findings of fact. He relies upon the judgment of the Hon'ble Apex Court in the case of Commissioner of Income-tax vs. Shivsagar Estate, reported at (2002) 257 ITR 59 (SC), to contend that this appeal is, therefore, misconceived. He states that no substantial question of law arises and department is trying to reopen the questions of facts only that too by arguments.

5. The Hon'ble Apex Court has in the judgment in the case of Commissioner of Income-tax vs. Shivsagar Estate (supra), relied upon by Shri Dewani, laid down that when no appeal was filed by the department against the order of High Court for earlier Assessment Year on identical facts, appeal filed before it was liable to be dismissed. Here, it is not in dispute that the appellant department has treated the expenditure incurred by assessee on glow sign boards and trolleys in previous Assessment year and in later two Assessment Years as revenue expenditure. The distinction sought to be made by Shri Parchure, learned counsel that said expenditure was only of maintenance cost is not born

out from record. There is no such stand taken even in appeal memo filed before us. In these circumstances, it is difficult for us to accept oral contentions raised by Shri Parchure, learned counsel for the first time. In view of the decision of the Hon'ble Apex Court mentioned above, it is clear that present appeal under Section 260-A, therefore, is not maintainable.

6. In Delhi Cloth & General Mills Company Limited vs. Additional Commissioner of Income-Tax (supra), the Tribunal had treated expenditure of Rs.7,730/- on purchase of new furniture and racks for replacement in the existing retail depots as expenditure of capital nature. Similarly, entire expenditure on electric fittings was held to be permissible deduction and it was also held that the Tribunal was justified in restricting the quantum of deduction to expenses as related to old depots only. Thus, expenditure on racks and furniture has been accepted as capital in nature while the proportionate expenditure on electric fittings was not accepted as capital expenditure insofar as it related to electric fittings to new depot. The establishment was of assessee. In facts before us, the glow sign boards and trolleys are used

by the dealers or agents of respondent assessee and are not at the establishment of assessee.

7. In Commissioner of Income-Tax, Andhra Pradesh vs. Taj Mahal Hotel, (supra), sanitary and pipeline fittings installed in hotel were held to constitute plant for the purposes of development rebate. It is apparent that hotel business could not have been commissioned without these fittings.

8. In Madras Industrial Investment Corporation Ltd. vs. Commissioner of Income-Tax (supra), the Hon'ble Apex Court has held that discount on debentures was revenue expenditure. It has also observed that ordinarily revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirety in the year in which it is incurred, it cannot be spread over a number of years even if the assessee has written off in his books, over a period of years. In the facts of present case, the Income-tax Appellate Tribunal has in para 12.2 accepted this very position and hence contention of Shri Parchure, learned counsel that the assessee had

treated it as deferred revenue expenditure spread over number of years is without any merit.

9. In Commissioner of Income-tax, Delhi-I vs. National Air Products Ltd. (supra), gas cylinders used for storing the gas manufactured has been treated as plant for the purposes of depreciation. Again, there cannot be any debate about this position.

10. In the facts of present case, the Income-tax Appellate Tribunal has found that glow sign boards are installed in the premises of the establishment of dealers, old or new, they are very fragile and do not have enduring life. The sign boards only help in identifying the place of sale of assessee's products. The business of assessee which consists of manufacturing and sale of ice-cream can be continued even without glow sign boards and glow sign boards or trolleys are not apparatus with which the assessee is carrying on his business. Thus findings of fact are not even questioned as erroneous or perverse in appeal memo. There is no plea that for earlier or subsequent assessment years what has been allowed as revenue expenditure is only cost of maintenance of glow sign

boards or trolleys.

11. In these circumstances, we are unable to accept the contention of Shri Parchure, learned counsel for the appellant, that substantial question of law as framed and reproduced above arises for our consideration. In fact, in view of finality attained in relation to earlier assessment year and treatment accorded to this very expenditure therein and in subsequent two assessment years relevant to the present assessment year, we find that present appeal itself is not maintainable. Income-tax Appeal is accordingly dismissed.

JUDGE **JUDGE**

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